SolarCity Corp. *and* Ravi Whitworth. Case 32–CA–180523

July 29, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 8, 2017, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

On October 22, 2018, the National Labor Relations Board issued a Notice to Show Cause why the issue of whether the Respondent's mandatory arbitration agreements violate Section 8(a)(1) of the National Labor Relations Act (the Act) should not be remanded to the judge for further proceedings in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017). The Respondent and the General Counsel each filed a response opposing remand. Because the only issue in this case is the facial lawfulness of the Respondent's arbitration agreements, and those agreements are already part of the record before us, we agree with the parties that a remand is unnecessary.

The National Labor Relations Board[1] has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

I. FACTS

The Respondent, headquartered in San Mateo, California, is engaged in the business of providing solar energy services. From January to September 2016, the Respondent required all newly hired employees in California to sign an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (the California January 2016 Agreement). The Respondent maintained a separate agreement applicable to its newly hired non-California employees from January to May 2016 (the Non-California January 2016 Agreement). The Respondent revised that agreement in May 2016 (the Non-California May 2016 Agreement). In September 2016, the Respondent implemented a new agreement applicable to all newly hired employees (the September 2016 Agreement).

The four Agreements are identical in all material respects. Except as noted otherwise below, each of the four Agreements contains the following language (emphasis added):

> *12. Arbitration.* In consideration of my employment with the Company, its promise to arbitrate all disputes with me, and my receipt of compensation and benefits provided to me by the Company, at present and in the future, **the Company and I agree to arbitrate any disputes between us that might otherwise be resolved in a court of law under the Federal Arbitration Act,** 9 U.S.C. § 1 *et seq.* (the "Federal Arbitration Act"), **and agree that all such disputes only be resolved by an arbitrator through final and binding arbitration,** and not by way of court or jury trial, **except as otherwise provided herein or to the extent prohibited by applicable law and in accordance with the Federal Arbitration Act.** I acknowledge that this Agreement is governed by the Federal Arbitration Act and evidences a transaction involving commerce. [3]
>
> A. Scope of Arbitration Agreement
>
> (1) **Disputes which the Company and I agree to arbitrate include, without limitation**, any disputes arising out of or relating to interpretation or application of this Agreement, **disputes regarding my employment with the Company or its affiliates (or termination thereof),** trade secrets, unfair competition, compensation, meal and rest periods, discrimination, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes

[1] Member Emanuel, who is recused, is a member of the panel but did not participate in this decision on the merits.

In *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum when one of the panel members has recused himself. Under the Court's reading of the Act, "the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 560 U.S. at 688; see also, e.g., *NLRB v. New Vista Nursing & Rehabilitation*, 870 F.3d 113, 127–128 (3d Cir. 2017); *D. R. Horton, Inc.*, 357 NLRB 2277, 2277 fn. 1 (2012), enfd. in relevant part 737 F.3d 344 (5th Cir. 2013); *1621 Route 22 West Operating Co.*, 357 NLRB 1866, 1866 fn. 1 (2011), enfd. 725 Fed. Appx. 129 (3d Cir. 2018).

[2] In a related case that is also issuing today, we address the lawfulness of the Respondent's maintenance of two substantially similar arbitration agreements. *SolarCity Corp.*, 369 NLRB No. 142 (2020) (*SolarCity I*). In *SolarCity I*, which is before the Board on remand from the United States Court of Appeals for the Fifth Circuit, we vacate the Board's underlying decision and dismiss the complaint.

[3] The Non-California Agreements do not contain references to the Federal Arbitration Act.

addressing the same or similar subject matters, **and all other statutory** and common law **claims** (excluding workers compensation, state disability insurance and unemployment insurance claims). **Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration.** Notwithstanding the foregoing, I understand and agree that DLSE claims, as set forth in subparagraph (5) below, must be arbitrated as set forth herein.

(2) **By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class or collective action, except to the extent such waiver is expressly prohibited by law.** Accordingly, to the maximum extent permitted by law, no dispute by the parties hereto shall be brought, heard or arbitrated as a class or collective action, and no party hereto shall serve as a member of any purported class, or collective proceeding, including without limitation pending but not certified class actions ("Class Action Waiver"). I understand and acknowledge that this Agreement affects my ability to participate in class or collective actions. The Company and I expressly agree that any disputes regarding the validity or enforceability of the foregoing Class Action Waiver may only be resolved by a civil court of competent jurisdiction and not by an arbitrator. In any case in which (a) a party files a dispute as a class or collective action, and (b) a civil court of competent jurisdiction finds all or part of the Class Action Waiver invalid or unenforceable, then such elements of the dispute for which the court determined that the Class Action Waiver was unenforceable shall be permitted to proceed in a court of competent jurisdiction, but any remaining portion of the dispute must still be resolved in arbitration, including any individual claims or grievances (and in no event shall an arbitrator have authority to arbitrate any class, collective, representative, or private attorney general action). [4]

* * * *

(5) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver and Representative Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, **the Company agrees not to retaliate against, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing or participation in a class, collective or representative action in any forum.** If I believe that anyone at the Company has retaliated against me for exercising my rights hereunder, I agree to immediately report this to the Company's Human Resources Department. [5]

(6) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Moreover, **to the extent consistent with application of the Federal Arbitration Act, this Agreement does not prohibit me from pursuing** claims that are expressly excluded from arbitration by statute (including, by way of example, claims that may not be arbitrated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), or under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX")); claims for workers' compensation benefits, unemployment insurance, or state or federal disability insurance; or **claims with** local, state, or **federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, the Federal Arbitration Act permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with** the U.S. Equal Employment Opportunity Commission, the U.S. Securities and Exchange Commission, the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, and **the National Labor Relations Board**. I similarly understand and agree that nothing in this Agreement shall prohibit or restrict me from initiating communications with, cooperating with, providing relevant information or testimony to, or otherwise assisting in an investigation conducted by one of the foregoing government agencies in relation to a possible violation of any applicable law, rule or regulation. However, I expressly acknowledge and agree that such permitted agency claims do not include claims under California Labor Code Section 98 et seq. with the California Labor Commissioner or Division of Labor Standards Enforcement

[4] The second par. of the Non-California Agreements also contain a representative-action waiver. The other Agreements place this waiver in the third paragraph.

[5] This language is in the fourth par. of the Non-California Agreements.

("DLSE")—such DLSE claims must be arbitrated in accordance with the provision of this Agreement.[6]

Jt. Exh. 8.

II. DISCUSSION

Applying the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), the judge found that the Respondent violated Section 8(a)(1) because employees would reasonably read the Agreements to interfere with their right to file unfair labor practice charges with the Board. While this case was pending on exceptions, the Board issued its decision in *Boeing,* in which it overruled the "reasonably construe" prong of *Lutheran Heritage*, announced a new standard for evaluating the lawfulness of facially neutral rules and policies, and decided to apply the new standard retroactively to all pending cases. 365 NLRB No. 154, slip op. at 2–3, 16–17. Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Section 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Section 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3.[7]

Subsequently, in *Prime Healthcare Paradise Valley, LLC*, we held that "an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful" because "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). We further stated that where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the standard set forth in *Boeing* applies. Id. Under that standard, the Board determines whether the arbitration agreement at issue, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Boeing*, 365 NLRB No. 154, slip op. at 3.[8] The Board held that, under *Boeing*, arbitration agreements violate the Act when, "taken as a whole, [they] make arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." *Prime Healthcare*, 368 NLRB No. 10, slip op. at 6. The Board also held that "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employee' access to the Board or its processes." Id.

Recently, however, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, we addressed the lawfulness of an agreement that required employees to arbitrate employment-related disputes, but also included "savings clause" language informing employees that they were free to file charges with the Board. 369 NLRB No. 70 (2020). The coverage language of the arbitration agreement at issue in *Anderson Enterprises*, when reasonably interpreted, encompassed claims arising under the Act. However, the agreement's savings clause provided that "[c]laims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." Id., slip op. at 1. We found that the savings clause was sufficiently prominent, id., slip op. at 3, and it specifically and affirmatively stated that employees may bring claims and charges before the Board. Accordingly, we concluded that the arbitration agreement could not be reasonably understood to potentially interfere with employees' access to the Board and its processes and that it was lawful under *Boeing* Category 1(a). Id., slip op. at 4.

Today, as noted above, we consider the lawfulness of the Respondent's arbitration agreements in this case and a related case, *SolarCity I*, 369 NLRB No. 142. In *SolarCity I*, we apply *Anderson Enterprises* and conclude that the Respondent lawfully maintained two prior versions of the arbitration agreements at issue here: the California 2013 and California 2014 Agreements. The four Agreements in

[6] This language is in the fifth paragraph of the Non-California Agreements.

[7] As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b) and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

[8] As *Boeing* itself makes clear, a challenged rule may not be found unlawful merely because it could be interpreted, under some hypothetical scenario, as potentially limiting some type of Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See id., slip op. at 9.

the instant case are essentially the same as the California 2014 Agreement in *SolarCity I*. Therefore, consistent with *SolarCity I*, we find that the Respondent also lawfully maintained the California January 2016, Non-California January 2016, Non-California May 2016, and September 2016 Agreements.

Like the coverage language in the agreements at issue in *Anderson Enterprises* and *SolarCity I*, the coverage language in the four Agreements, when reasonably interpreted, encompasses claims arising under the Act. However, the Agreements also contain savings clauses providing that

> to the extent consistent with application of the Federal Arbitration Act, this Agreement does not prohibit me from pursuing claims . . . with . . . federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, the Federal Arbitration Act permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board.[9]

As in *Anderson Enterprises* and *SolarCity I*, we find the savings clauses here are sufficiently prominent and unmistakably clear. Like the savings clause in the California 2014 Agreement, the savings clauses here are located one page below the coverage language, and the Agreements' introductory paragraphs note that there are exceptions. See *SolarCity I*, 369 NLRB No. 142, slip op. at 4 fn. 6. Further, using language similar to that in the California 2014 Agreement, the savings clauses specifically and affirmatively state that employees may file charges with the Board. Although it is unlikely that employees would know whether "the Federal Arbitration Act" or "applicable law" permits them to access the Board or permits the Board to adjudicate claims "notwithstanding the existence of an enforceable arbitration agreement," any uncertainty is immediately dispelled by language expressly clarifying that permitted claims include charges or complaints filed with the National Labor Relations Board.[10]

In finding the Agreements unlawful, the judge also relied on the class- and collective-action waivers (class-action waivers) in the Agreements, and the Board has also relied on class-action waivers to support a finding that an arbitration agreement unlawfully interferes with access to the Board. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 6 (2015). We disagree that the class-action waivers affect the outcome of this case. The four Agreements contain essentially the same class-action waiver as the California 2014 Agreement—stating that employees "expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class or collective action, except to the extent such waiver is expressly prohibited by law"[11]—and in *SolarCity I*, we find the class-action waiver language does not render the California 2014 Agreement unlawful. 369 NLRB No. 142, slip op. at 5. As we observe there, the Agreements must be read as a whole,[12] and they include savings-clause language expressly preserving the right to file "a charge or complaint with . . . the National Labor Relations Board." Objectively reasonable employees would not read the class-action waivers to interfere with their access to the Board when the savings clauses expressly contradict such an interpretation.

Moreover, the class-action waivers cannot interfere with a right to file a class, collective, or representative Board action because Board procedures do not include such actions.[13] Charging parties do not represent anyone; they simply set the Board's investigatory machinery in motion. See NLRA Section 10(b) (providing in relevant part that the Board has the power to issue complaint "[w]henever it is charged that any person has engaged in or is engaging in any . . . unfair labor practice"). If a charge is found to have merit, the General Counsel prosecutes the action "'in the public interest and not in vindication of private rights.'" *Kelly Services, Inc.*, 368 NLRB No. 130, slip op. at 5 fn. 8 (2019) (quoting *Robinson Freight Lines*, 117 NLRB 1483, 1485 (1957)). It is unlikely that rank-and-file employees unfamiliar with Board law would know as much. However, it is equally unlikely they would believe to the contrary, since the Agreements

[9] The Non-California Agreements refer to "applicable law" rather than the Federal Arbitration Act.

[10] We note that a savings clause in an arbitration agreement need not necessarily expressly refer to the National Labor Relations Board, the NLRB, or the Board to sufficiently preserve employees' right to file charges with the Board. See *Hobby Lobby Stores, Inc.*, 369 NLRB No. 129, slip op. at 3 (2020) (finding legally sufficient to preserve employees' right of access to the Board savings-clause language stating that employees who sign arbitration agreement "are not giving up . . . the right to file claims with federal . . . government agencies"). Necessarily, then, there can be no question of the legal sufficiency of savings clauses like those here, which expressly and prominently refer to employees' right to file charges or complaints with the National Labor Relations Board.

[11] The Agreements also contain a representative-action waiver.

[12] When interpreting employer policies, the Board "'must refrain from reading particular phrases in isolation.'" *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 5 (quoting *Lutheran Heritage*, 343 NLRB at 646).

[13] The Board does not have class actions, Fair Labor Standards Act–type collective actions, or Private Attorneys General Act–type representative actions.

do not remotely suggest that the class-action waivers apply to Board proceedings.[14]

In finding the Agreements unlawful, the judge also relied in part on the provisions stating: "Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration." The judge found that this language did "nothing to save the agreements from infringing on employees' rights to engage in Section 7 activity" because "[t]he procedural mechanisms for bringing cases before the Board do not contemplate exhausting the Board's procedures as a means to the end of arbitrating a claim."

Contrary to the judge, the "exhaustion of administrative remedies" provisions do not detract from the clear import of the savings clauses that employees are free to seek redress from the Board. To begin, the judge simply found that these provisions are insufficient as savings clauses; she did not find that they independently restrict employees' right to file Board charges—and they do not. It would be unreasonable for employees to read these provisions, which do not even mention the Board, as limiting their access to the Board when the savings clauses expressly preserve such access and contradict such an interpretation.

In addition, these provisions *encourage* employees to file claims with administrative agencies. Even if an employee mistakenly believed that filing a Board charge is merely a procedural prelude to making a claim in arbitration, upon filing a charge the employee would soon learn from the regional office that the Board provides a wholly separate and independent forum for their claims, since under Section 10(a) of the Act the Board's authority to prevent and remedy unfair labor practices is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise."

For these reasons, we find that the agreements at issue here cannot be reasonably understood to interfere with employees' access to the Board and its processes. The Agreements are therefore lawful under *Boeing* Category 1(a). See *Boeing*, 365 NLRB No. 154, slip op. at 4 (holding that Category 1(a) consists of "rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights") (internal footnote omitted); see also *SolarCity I*, 369 NLRB No. 142, slip op. at 4-5 (finding that the Respondent lawfully maintained two substantially similar arbitration agreements). Accordingly, we dismiss the complaint.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 29, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Judith J. Chang, Esq., for the General Counsel.
Gordon A. Letter, Esq., Richard H. Rahm, Esq., and *Lisa Linn Garcia, Esq. (Littler Mendelson, PC),* for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, ADMINISTRATIVE LAW JUDGE. This case was tried based on a joint motion and stipulation of facts I approved on June 14, 2017. Charging Party Ravi Whitworth filed the charge on July 20, 2016, and the General Counsel issued the complaint on November 29, 2016. Solarcity Corp. (the Respondent) filed an answer on December 13, 2016, denying all material allegations.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining arbitration agreements that interfere with employees' Section 7 rights to engage in collective legal activity, and interfere with employees' access to the National Labor Relations Board (NLRB or Board) and its processes. It further alleges that the Respondent has enforced an arbitration agreement to interfere with the Charging Party's class, collective, and representative lawsuit.

On February 17, 2017, the Respondent signed a stipulation and waiver in which it agreed to waive defenses to piecemeal litigation it may have if the General Counsel withdrew certain complaint allegations, and placed them in abeyance pending the outcome of *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic System Corp*., 823 F.3d 1147 (7th Cir. 2016); and *Morris v. Ernst & Young*, 834 F.3d 975 (9th Cir. 2016), pending before the Supreme Court at the time of this decision. The General Counsel accordingly withdrew and placed in abeyance the allegations regarding whether maintenance of the arbitration agreements interfered with employees' Section 7 rights to engage in collective legal action, and whether the

[14] Moreover, the Agreements also contain a provision assuring employees that "the Company agrees not to retaliate against, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Sec[.] 7 of the National Labor Relations Act by filing or participation in a class, collective, or representative action *in any forum*" (emphasis added). Thus, even if employees mistakenly thought that Board procedures allowed for class, collective, or representative actions, the foregoing language would assure them that they could file such actions safely.

Respondent enforced one of the agreements in a manner that interfered with the Charging Party's Section 7 activity of filing a class action, collective action, and representative action lawsuit in Federal District Court. As such, the issue addressed in this decision is whether the arbitration agreements interfere with employees' access to the Board and its processes.

On the entire record, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation with an office and place of business in San Mateo, California, is a solar energy service provider. During the relevant time period, the Respondent purchased and received at its San Mateo, California facility goods valued in excess of $50,000 directly from points located outside the State of California. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times between January 21, 2016, and September 21, 2016, the Respondent required newly hired employees in the State of California to sign as a condition of employment an "At-Will Employment, Confidential Information, Invention Assignment, and Arbitration Agreement" (California Arbitration Agreement), which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 18; Jt. Exh. 8.)[1]

At all times between January 21, 2016, and May 15, 2016, the Respondent required its newly hired employees working in the United States other than in the State of California to sign as a condition of employment an arbitration agreement that is substantially similar to the Arbitration Agreement (Non-California Arbitration Agreement), which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 19; Jt. Exh. 9.) The Non-California Agreement was revised in May 2016 ("Revised Non-California Arbitration Agreement). From approximately May 16, 2016, to September 21, 2016, the Respondent required its newly hired employees working in the United States other than in the State of California to sign the Revised Non-California Agreement as a condition of employment, which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 20; Jt. Exh. 10.)

On or about September 22, 2016, the Respondent implemented a new Arbitration Agreement (September 2016 Arbitration Agreement). Since that time, the Respondent has required all newly hired employees throughout the United States, including California, to sign as a condition of employment the September 2016 Arbitration Agreement, which it continues to maintain and enforce as to those employees who signed it. (Stip. ¶ 21; Jt. Exh. 11.)

All of the arbitration agreements at issue contain the following language, or substantially similar language, in the section entitled "Scope of Agreement":

> Arbitration
> . . .
> A. Scope of Arbitration Agreement
> (1) Disputes which the Company and I agree to arbitrate include, without limitation, any disputes arising out of or relating to interpretation or application of this Agreement, disputes regarding my employment with the Company or its affiliates (or termination thereof), trade secrets, unfair competition, compensation, meal and rest periods, discrimination, harassment, claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, and all other statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration. . . .
> (2) By signing below, I expressly agree to waive any right to pursue or participate in any dispute on behalf of, or as part of, any class or collective action, except to the extent such waiver is expressly prohibited by law. . . . I understand and acknowledge that this Agreement affects my ability to participate in class or collective actions.
> . . .
> (5) The Company may lawfully seek enforcement of this Agreement and the Class Action Waiver and Representative Action Waiver under the Federal Arbitration Act, and may seek dismissal of such claims. However, the Company agrees not to retaliate against, discipline, or threaten discipline against me or any other Company employee as a result of my, his, or her exercise of rights under Section 7 of the National Labor Relations Act by filing or participation in a class, collective or representative action in any forum. If I believe that anyone at the Company has retaliated against me for exercising my rights hereunder, I agree to immediately report this to the Company's Human Resources Department.
> . . .
> (6) I understand that nothing contained in this Agreement shall be construed to prevent or excuse me from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Moreover, to the extent consistent with application of the Federal Arbitration Act, this Agreement does not prohibit me from pursuing claims that are expressly excluded from arbitration by statute (including, by way of example, claims that may not be arbitrated under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111-203), or under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX")); claims for workers'

[1] Jt. Exh. stands for "joint exhibit" and Stip. stands for "stipulation of facts." Although I have included some citations to the record, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

compensation benefits, unemployment insurance, or state or federal disability insurance; or claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer employment related laws, but only if, and to the extent, the Federal Arbitration Act permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with the U.S. Equal Employment Opportunity Commission, the U.S. Securities and Exchange Commission, the National Labor Relations Board, the Department of Labor, the Occupational Safety and Health Commission, and the National Labor Relations Board. I similarly understand and agree that nothing in this Agreement shall prohibit or restrict me from initiating communications with, cooperating with, providing relevant information or testimony to, or otherwise assisting in an investigation conducted by one of the foregoing government agencies in relation to a possible violation of any applicable law, rule or regulation. . . . .

III. DECISION AND ANALYSIS

The arbitration agreements were imposed on all employees as a condition of hiring or continued employment by Solarcity and are therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647. The issue in the instant case is whether employees would reasonably construe the arbitration agreements to prohibit activity protected by Section 7.

In evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; *Lafayette Park Hotel*, 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467–470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

The first sentence regarding the scope of the agreement, at Section A(1), begins with: "Disputes which the Company and I agree to arbitrate include, *without limitation* . . . disputes regarding my employment with the Company or its affiliates (or termination thereof) . . . ." (emphasis supplied). The wording of this provision is clear—all employment disputes, without limitation, must be arbitrated. Clearly, disputes that would fall within the Board's purview are encompassed by this introductory phrase.

The first sentence continues to list certain disputes that, without limitation, must be arbitrated, including disputes about "compensation, meal and rest periods, discrimination, harassment" and "claims arising under the . . . "Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non-Discrimination Act, all state statutes addressing the same or similar subject matters, and all other statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims)." Again, certain disputes that would fall within the Board's purview, such as a collective complaint about compensation or a collective complaint about discrimination for engaging in activity protected by Section 7, are clearly encompassed by the language of this section.[2]

Considering that ambiguities must be construed against the Respondent as the arbitration agreements' drafter, I resolve the conflict between the language requiring arbitration of all employment disputes "without limitation" and the carve-out provisions detailed above and analyzed below, in the Charging Party's favor. Why would employees think the term "without limitation" means anything other than its plain and simple definition? There is simply no reason for the "without limitation" qualifier language attributed to disputes about employment to be included in the agreements if not to confuse the reader. Notably, the phrase "without limitation" is the only qualifier that does not presuppose legal knowledge by the reader. Any exclusions to the agreements' applicability are phrased in terms of when other laws require such exclusions. I find a reasonable employee would read the arbitration agreements to require all employment disputes to be arbitrated without limitation, and I therefore find the agreements violate the Act as alleged.

Though I find the all-encompassing language in the first paragraph ends the analysis, I will continue to review other parts of the agreements in the event a reviewing authority does not agree with me.

The second sentence in the scope of agreement section states, "Nothing in this Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill that party's obligation to exhaust administrative remedies before making a claim in arbitration." While this sentence provides a limited exception to bring claims before an administrative agency, it is phrased in terms of exhaustion of administrative remedies prior to making a claim for

[2] The only exclusions in this section are workers compensation, state disability, and unemployment insurance claims.

arbitration. The procedural mechanisms for bringing cases before the Board do not contemplate exhausting the Board's procedures as a means to the end of arbitrating a claim. I therefore find that this provision does nothing to save the agreements from infringing on employees' rights to engage in Section 7 activity.

The next paragraph, at Section A(2), requires employees to waive the right to participate in class or collective action "except to the extent such waiver is expressly prohibited by law." A reasonable employee reading this in the context of the rest of the document is not going to know that the phrase "to the fullest extent permitted by law" excuses disputes resulting in NLRB charges from mandatory binding arbitration. See *2 Sisters Food Group, Inc*., 357 NLRB 1816, 1822 (2011); *Solarcity Corp.*, 363 NLRB No. 83, slip op. at 7 (2015).

Finally, the last section concerning the scope of the agreements, Section A(6), permits employees to file charges with the Board "to the extent consistent with application of the Federal Arbitration Act." The limiting language permits such a charge "only if, and to the extent, the Federal Arbitration Act permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement." Again, without specific legal knowledge of a highly complex and clearly disputed area of law, employees are not going to be able to meaningfully interpret this provision. Moreover, the flawed carve-out provision is reasonably read, within the context of the agreement as a whole, to preclude Board charges seeking group or collective action and relief. *Solarcity*, supra.

Interestingly, this section also permits, with the same qualifier, charges or complaints with the U.S. Equal Employment Opportunity Commission, the federal agency charged with enforcing the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and the Genetic Information Non-Discrimination Act, among other laws. Yet all of these laws are specifically enumerated in the first section as being subject to the arbitration agreements "without limitation". The only way to reconcile these two provisions is to read the agreements as permitting the filing of a charge with an administrative agency, but ultimately requiring those disputes to be resolved only through final and binding arbitration under the agreements rather than through whatever fruits filing a charge or other similar effort may bear. The same rationale holds true for Board proceedings, given that the agreements require individual arbitration of disputes over employment disputes, including those involving wages and meal/break periods. This begs the question: Why would any employee bother to file a charge? A reasonable employee, not versed in how various federal, state, and local agencies process claims, would take it at face value that the topics specifically included as falling within the agreements would be subject to individual arbitration, regardless of where or how a charge was originally filed.

The Respondent has raised a timeliness defense under Section 10(b) of the Act, which provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." It is undisputed the Respondent continued to maintain and enforce the agreements within 6 months of the July 20, 2016 charge. See *PJ Cheese, Inc*., 362 NLRB 1452, 1452 (2015). Accordingly, any statute of limitations argument fails.

Based on the foregoing, I find the General Counsel has met his burden to prove the arbitration agreements at issue violate the Act because employees would reasonably conclude the agreements prohibit or restrict their right to file unfair labor practice charges with the Board, including charges that seek to raise group or collective concerns.

IV. CONCLUSIONS OF LAW

(1) Respondent Solarcity Corp. is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondents violated Section 8(a)(1) by interfering with employees' access to the Board and its processes by maintaining language in four arbitration agreements which employees would reasonably conclude prohibits or restricts their right to file unfair labor practice charges with the Board, including charges that seek to raise group or collective concerns.

(3) The complaint is not barred by Section 10(b) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the arbitration agreements are unlawful, the recommended order requires that the Respondent revise or rescind them in all of its forms to make clear to employees that the arbitration agreements do not restrict employees' right to file charges and pursue claims, including group or collective claims, with the National Labor Relations Board. The Respondent shall notify all current and former employees who were required to sign the arbitration agreements in any form that they have been rescinded or revised and, if revised, provide them a copy of the revised agreement(s). I will recommend that the Respondent post a notice in all locations where the Arbitration Agreement and Revised Arbitration Agreement were utilized. *U-Haul Co. of California*, 347 NLRB 375, 375 fn. 2 (2006); see also *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Solarcity Corporation, San Mateo, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration program that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board, including charges that seek to raise group or collective concerns.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration agreement in all of its forms or revise it in all of its forms to make clear to employees that the arbitration agreement does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its San Mateo facility and at all other facilities where the unlawful arbitration agreements have been maintained, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 21, 2016.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 32 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 8, 2017

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain a mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board, including charges that seek to raise group or collective concerns, or to access the Board's processes.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind the arbitration agreement in all of its forms on a nationwide basis to make clear to employees that the arbitration agreement does not prohibit or restrict employees' right to file charges with the Board, including charges that seek to raise group or collective concerns.

WE WILL notify all applicants and current and former employees who were required to sign the arbitration agreements in any form and at any location that the arbitration agreement has been rescinded or revised, and if revised, provide them with a copy of the revised agreement.

SOLARCITY CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-180523 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."